APPENDIX A
Court of Appeals of New York Opinion and Order

ARRINGTON v NY TIMES CO. [55 NY2d 433]

Statement of Case

Clarence W. Arrington, Appellant, v The New York Times Company et al., Respondents.

Argued February 11, 1982; decided April 7, 1982

SUMMARY

APPEAL from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 25, 1980, which modified, on the law, and, as modified, affirmed an order of the Supreme Court at Special Term (LOUIS OKIN, J.), entered in New York County, (1) granting a motion by defendants Contact Press Images, Inc., Gorgoni and Pledge to dismiss the complaint against them, (2) granting a motion by the defendant New York Times Company to dismiss the complaint against it, and (3) granting leave to the plaintiff to serve an amended complaint against the defendant New York Times Company for violation of the right to privacy not based on an alleged violation of sections 50 and 51 of the Civil Rights Law. The modification consisted of striking the leave to the plaintiff to serve an amended complaint.

Plaintiff's action for money damages and injunctive relief arose from the *New York Times Magazine's* nonconsensual publication of his photograph as the most prominent illustration of a feature article entitled "The Black Middle Class: Making It". The picture, apparently taken while Arrington was walking along a street in New York City, was prominently displayed across the cover of the publication. Arrington, whose name was not mentioned in the article, had no prior knowledge that the photograph had been taken, much less that it would be sold or published or that it would be used

in connection with this or any other article. Defendant The New York Times Company, which published the article, described it as a commentary on the role of the expanding black middle class, in the course of which its author concluded that this group has been growing more removed from its less fortunate brethren. Arrington, a young financial analyst, regarded the text of the article not only as controversial but as one expressive of views he does not credit or practice. He alleged that he and readers who knew him found it "insulting, degrading, distorting and disparaging". This, he alleged, subjected him to public scorn and ridicule. His complaint, sounding in tort, was predicated on three theories: violation of sections 50 and 51 of the Civil Rights Law, invasion of common-law right of privacy and a similar imposition on a constitutional right to privacy. Other than the publisher, joined as defendants were the photographer who took the picture at the behest of the Times, the photographic agency which allegedly handled the financial arrangements and the agency's president. All four defendants moved to dismiss the complaint for failure to state a cause of action.

The Court of Appeals modified by denying the motion by defendants other than the Times Company to dismiss the complaint, and, as modified, affirmed, holding, in an opinion by Judge FUCHSBERG, that a picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising within the prohibition of sections 50 and 51 of the Civil Rights Law unless it has no real relationship to the article, and plaintiff's allegation that his views are not consonant with those of the author of the article does not bring him within the "real relationship" exception; that if plaintiff were to establish the truth of his allegations that the article subjected him to public scorn and ridicule, the acts in which the defendants other than the Times Company will have been proved to have engaged will have included that of a nonconsensual selling of the photograph constituting a commercialization of the photograph in furtherance of trade within the prohibitions of sections 50 and 51 of the Civil Rights Law; and that there is no decisional support for the existence of a common-law right of privacy, and there can be

no abridgment of a constitutional right to privacy since no State action is involved.

Arrington v New York Times Co., 78 AD2d 839, modified.

HEADNOTES

Civil Rights - Commercial Use of Photograph Without Consent - Use of Photograph in Article of Public Interest

1. In an action for money damages and injunctive relief arising from a newspaper magazine's publication of plaintiff's photograph as the most prominent illustration of a feature article, alleging violations of sections 50 and 51 of the Civil Rights Law, which ban the use for advertising purposes or for purposes of trade of the name, portrait or picture of a living person unless that person's written consent has first been obtained, the complaint is dismissed as against the defendant publisher; a picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising within the prohibition of the statute unless it has no real relationship to the article, and plaintiff's allegation that his views are not consonant with those of the author of the article does not bring him within this "real relationship" exception.

Civil Rights - Commercial Use of Photograph Without Consent

2. In an action for money damages and injunctive relief arising from a newspaper magazine's publication of plaintiff's photograph as the most prominent illustration of a feature article, alleging violations of sections 50 and 51 of the Civil Rights Law, which ban the use for advertising purposes or for purposes of trade of the name, portrait or picture of a living person unless that person's written consent has first been obtained, a motion to dismiss the complaint for failure to state a cause of action by the photographer who took the picture, the agency which handled the financial arrangements and the

agency's president, is denied; were plaintiff to establish the truth of his allegations that the article, which expressed views that he does not credit or practice, subjected him to public scorn and ridicule, the acts in which one or more of these defendants, as opposed to the publisher of the article, will have been proved to have engaged will have included that of a non-consensual selling of the photograph constituting a commercialization of the photograph in furtherance of trade within the prohibitions of sections 50 and 51 of the Civil Rights Law.

Civil Rights - Commercial Use of Photograph Without Consent - Right of Privacy

3. In an action for money damages and injunctive relief arising from a newspaper magazine's publication of plaintiff's photograph as the most prominent illustration of a feature article, alleging invasion of a common-law right of privacy and a similar imposition on a constitutional right to privacy, a motion to dismiss the complaint for failure to state a cause of action is granted; there is no decisional support for the existence of a common-law right of privacy, and there can be no abridgment of a constitutional right to privacy since no State action is involved.

POINTS OF COUNSEL

Herve Gouraige, Donald J. Zoeller, John J. Kirby, Jr., and *Douglas M. Parker* for appellant. I. The complaint states a cause of action under sections 50 and 51 of the Civil Rights Law (*Thompson v Close-Up, Inc.*, 277 App Div 848; *Pierrottie v Dell Pub. Co.*, 199 F Supp 686; *Murray v New York Mag. Co.*, 27 NY2d 406; *Gautier v Pro-Football, Inc.*, 304 NY 354; *Binns v Vitagraph Co. of Amer.*, 210 NY 51; *Dallesandro v Holt & Co.*, 4 AD2d 470, 7 NY2d 735; *Koussevitzky v Allen, Towne & Heath*, 188 Misc 479, 272 App Div 759; *Lahiri v Daily Mirror*, 162 Misc 776; *Sutton v Hearst Corp.*, 277 App Div 155.) II. The complaint states a cause of action for common-law invasion of privacy. (*Moore v New York El.R.R. Co.*, 130 NY 523; *Schuyler v Curtis*, 40 NY St Rep 289, 64 Hun 594, 54 NY

St Rep 936, 147 NY 434; *Marks v Jaffa*, 6 Misc 290; *MacKenzie v Soden Min. Springs Co.*, 27 Abb NC 402; *Kujek v Goldman*, 150 NY 176; *Wolston v Reader's Digest Assn.*, 443 US 157; *Hutchinson v Proxmire*, 443 US 111; *Owen v Partridge*, 40 Misc 415; *Spahn v Julian Messner, Inc.*, 43 Misc 2d 219, 23 AD2d 216, 18 NY2d 324, vacated and remanded *sub nom. Julian Messner, Inc. v Spahn*, 387 US 239, 20 NY2d 752, 21 NY2d 124, 393 US 1046; *Geisler v Petrocelli*, 616 F2d 636.) III. The complaint states a cause of action for violation of State and Federal constitutional rights to privacy. (*Barrows v Jackson*, 346 US 249; *Shelley v Kraemer*, 334 US 1; *Galella v Onassis*, 353 F Supp 196; *Nader v General Motors Corp.*, 57 Misc 2d 301, 31 AD2d 392, 25 NY2d 560; *Marsh v Alabama*, 326 US 501; *Associated Press v United States*, 326 US 1; *New York Times Co. v Sullivan*, 376 US 254; *Whalen v Roe*, 429 US 589; *Roe v Wade*, 410 US 113, 959; *Rosenblatt v Baer*, 383 US 75.)

Floyd Abrams, Dean Ringel, Howard G. Sloane, Richard Coll, Katherine P. Darrow and *George Freeman* for The New York Times Company, respondent. I. The courts below correctly ruled that the complaint fails to state a cause of action under sections 50 and 51 of the Civil Rights Law. (*Roberson v Rochester Folding Box Co.*, 171 NY 538; *Sidis v F-R Pub. Corp.*, 34 F Supp 19, 113 F2d 806; *Davis v Duryea*, 99 Misc 2d 933; *Callas v Whisper, Inc.*, 198 Misc 829, 278 App Div 974, 303 NY 759; *Gautier v Pro-Football, Inc.*, 304 NY 354; *Rand v Hearst Corp.*, 31 AD2d 406, 26 NY2d 806; *Murray v New York Mag. Co.*, 27 NY2d 406; *Paulsen v Personality Posters*, 59 Misc 2d 444; *Pagan v New York Herald Tribune*, 32 AD2d 341; *Lahiri v Daily Mirror*, 162 Misc 776.) II. The court below correctly ruled that no common-law basis exists for plaintiff's claim. (*Cohen v Hallmark Cards*, 45 NY2d 493; *Wojtowicz v Delacorte Press*, 43 NY2d 858; *Kiss v County of Putnam*, 59 AD2d 773; *Eliah v Ucatan Corp.*, 433 F Supp 309; *Gautier v Pro-Football, Inc.*, 304 NY 354; *Cardy v Maxwell*, 9 Misc 2d 329; *Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196.) III. The court below correctly ruled that no constitutional basis exists for plaintiff's claim. (*Paul v Davis*, 424 US 693; *Reilly v Leonard*, 459 F Supp 291; *Katz v United States*,

389 US 347; *New York Times Co. v Sullivan*, 376 US 254; *Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196; *N.A.A.C.P. v Button*, 371 US 415; *Rand v Hearst Corp.*, 31 AD2d 406; *Davis v Duryea*, 99 Misc 2d 933.)

Tennyson Schad for Contact Press Images, Inc., and others, respondents. The courts below correctly ruled that the complaint fails to state a cause of action against Gorgoni, Contact and Pledge.

OPINION OF THE COURT

FUCHSBERG, J.

This action, for money damages and injunctive relief, arises from the *New York Times Magazine's* nonconsensual publication of plaintiff Clarence W. Arrington's photograph as the most prominent illustration of a feature article entitled "The Black Middle Class: Making It". The magazine, a part of the Sunday edition of *The New York Times*, is circulated widely throughout City, State, and Nation, and elsewhere. The picture, apparently taken while Arrington was walking along a street in New York City, was prominently displayed across the cover of the publication. Arrington, whose name was not mentioned in the article, had no prior knowledge that the photograph had been taken, much less that it would be sold or published or that it would be used in connection with this or any other article. These facts are unquestioned.

Defendant The New York Times Company (hereinafter the Times), which published the article, in its brief describes it as a commentary on "the role of the expanding black middle/professional class in today's society", in the course of which, among other things, its author concludes that "this group has been growing more removed from its less fortunate brethren." Arrington, a young financial analyst, who then plied his profession with General Motors and now pursues it with the Ford Foundation, regards the text of the article not only as controversial but as one expressive of views he does not credit or practice. Moreover, as he alleges in this action, he and readers who knew him found it "insulting, degrading,

distorting and disparaging" not only of black persons of "middle class" status generally but also of himself, as its supposed exemplar, in particular. This, he goes on, subjected him to public scorn and ridicule, principally either because others quite reasonably took the article's idea to be ones he shares or because it was assumed that he at least in part had changed his vocation to that of professional model.

Plaintiff's complaint, sounding in tort, was predicated on three theories: violation of sections 50 and 51 of New York's Civil Rights Law,[1] invasion of common-law right of privacy and a similar imposition on a constitutional right to privacy. Other than the publisher, joined as defendants were Gianfranco Gorgoni, a free-lance photographer who took the picture at the behest of the Times, Contact Press Images, Inc., the photographic agency which allegedly handled the financial arrangements under which Gorgoni did so and Robert Pledge, Contact's president. In due course, all four defendants moved under CPLR 3211 (subd [a], par [7]) to dismiss the complaint for failure to state a cause of action.

Special Term was of the view that sections 50 and 51 will not support a charge of "actionable commercial exploitation where the picture is published in connection with an article of

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1. Section 50 reads as follows: "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor".

Section 51, as amended last in 1921 (L 1921, ch 501) makes a violation of section 50 actionable in a civil suit. It specifically provides, as relevant to this case, that "Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages."

general interest". On that premise plus the additional rationale that in the end it was the Times alone and not its three codefendants who were "responsible for the publication [and placement] of the picture", it dismissed against all the defendants. Nevertheless, in obeisance to what it sensed was an emerging "right to be let alone, sometimes referred to as [a] constitutional right of privacy", it granted plaintiff leave to serve an amended complaint against the Times on grounds other than those spelled out by sections 50 and 51.

[1–3] On cross appeals by Arrington and the Times, the Appellate Division, finding no decisional support for the existence of a common–law right of privacy and that the circumstances here do not come within the orbit of any constitutional protection, modified on the law by deleting the leave to amend; Justice KUPFERMAN, in a sole partial dissent, relying on Prosser on Torts (4th ed, pp 812–813), thought Arrington had spelled out a cause of action for having been placed in a "false light in the public eye". On the present appeal, though, contrary to the holdings below, we believe the case should proceed against the individual defendants, we are of the view that the result reached as to the Times was correct.

Our analysis may well begin with sections 50 and 51. Facially, these statutes simply ban the use "for advertising purposes, or for the purposes of trade" of the name, portrait or picture of a living person unless that person's written consent has first been obtained. Yet, in light of the decisional event which led directly to their adoption, what their seemingly uncomplicated texts affirmatively provide must be said to have been overshadowed by what these do not say.

The statutory scheme was enacted as a direct response to *Roberson v. Rochester Folding Box Co.* (171 NY 538). In this oft–cited case, some 25,000 reproductions of a photograph of the infant plaintiff were distributed throughout the country without her knowledge or consent in order to advertise defendant's flour. Most significantly, in sustaining a demurrer to so much of the complaint as was framed in terms of a violation of an alleged right to privacy, the court broadly denied the existence of such a cause of action under New York common

law. It is noteworthy, therefore, that, while concern engendered by this decision prompted the Legislature to enact sections 50 and 51, these were drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more. Put another way, the Legislature confined its measured departure from existing case law to circumstances akin to those presented in *Roberson*. In no other respect did it undertake to roll back the court-pronounced refusal to countenance an action for invasion of privacy.

Nor has the Legislature chosen to enlarge the scope of sections 50 and 51 in the fourscore years since *Roberson* was handed down. This despite the court's consistent adherence to its position that, as such, in this State "there exists no so-called common-law right to privacy" (*Cohen v Hallmark Cards*, 45 NY2d 493, 497, n 2; see, also, *Wojtowicz v Delacorte Press*, 43 NY2d 858; *Gautier v Pro-Football, Inc.*, 304 NY 354, 358).

[1] Moreover, this narrow reading of the statutory provisions has not been without sensitivity to the potentially competing nature of the values the Legislature, on the one hand, served by protecting against the invasion of privacy for purposes of "advertising" or "trade" and, on the other, the values our State and Federal Constitutions bespeak in the area of free speech and free press. Thus, we not too long ago reiterated that "'[a] picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising within the prohibition of the statute *** unless it has no real relationship to the article *** or unless the article is an advertisement in disguise'" (*Murray v New York Mag. Co.*, 27 NY2d 406, 409 [magazine cover photograph illustrating a feature story], quoting from *Dallesandro v Holt & Co.*, 4 AD2d 470, 471, app dsmd 7 NY2d 735). And this holds true though the dissemination of news and views is carried on for a profit or that illustrations are added for the very purpose of encouraging sales of the publications (see *Pagan v New York Herald Tribune*, 26 NY2d 941, affg 32 AD2d 341, 343; *Callas v Whisper, Inc.*, 198 Misc 829, affd 278 App Div 974, affd 303 NY 759; *Oma v Hillman Periodicals*, 281 App Div 240, 244; *Paulsen v Personality Posters*, 59 Misc 2d 444, 447-448

[FRANK, J.]; *Lahiri v Daily Mirror*, 162 Misc 776 [SHEINTAG, J.]).

Now it can hardly be questioned that the article in this case, dealing as it does with the circumstances and tensions incident to yet another example of the mobility our country prides itself on encouraging within and among our societal groups, relates to a subject of "public interest", clearly a term to be freely defined (see *Lahiri v Daily Mirror, supra*, at p 782). Accepting that proposition, plaintiff nevertheless seeks to bring himself within the "no real relationship" exception referred to in our *Murray* decision. To this end, he does not deny that, by external and objective criteria, such as race, educational background, professional status, personal poise and habit of dress, he may be perceived to be a member of "the black middle class". Indeed, he does not dispute that the picture used by the Times portrays no more than what one might expect an upper or "middle class" man of good taste and attire, whatever the color of his skin, to look like.

Plaintiff's emphasis, rather, is on the fact that, as he reads it, the article depicts the "black middle class" as one peopled by "materialistic, status-conscious and frivolous individuals without any sense of moral obligation to those of their race who are economically less fortunate", a conception of the "class" with which he disclaims any "legitimate connection".[2] While the concededly innocuous title of the article is superimposed over part of the picture (as is the title of another on Christmas pleasures), nothing of the ideas with which he wishes to disassociate himself appear at this point. And, though the article itself gives the names and quotes the statements and opinions of persons whom the author

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2. Without in any way detracting from the reasonableness of the impression gathered by the plaintiff from his evaluation of the article as a whole, we note that its author, William Brashler, also expressed the opinion that "some of the 'haves' in the new black middle class are keeping up the fight, trying to find jobs for black kids, keep them out of trouble, deal with drugs, teach some skills, make black life for poor blacks bearable, offset the lure of the hustle. Every city in the country has its private and public agencies *** full of sharp, dedicated, mostly middle-class black staffers and volunteers".

interviewed, as indicated earlier, the plaintiff is neither mentioned, nor are any of the ideas or opinions it expresses attributed to him. The asserted lack of a "real relationship" boils down then, to his conviction that his views are not consonant with those of the author. But this disagreement cannot extend the compass of sections 50 and 51 for, in such matters, it would be unwise for us to essay the dangerous task of passing on value judgments based on the subjective happenstance of whether there is agreement with views expressed on a social issue.

No more persuasive is plaintiff's perfectly understandable preference that his photograph not have been employed in this manner and in this connection. However, other than in the purely commercial setting covered by sections 50 and 51, an inability to vindicate a personal predelection [sic] for greater privacy may be part of the price every person must be prepared to pay for a society in which information and opinion flow freely.

For related reasons, plaintiff's "false light" formulation[3] cannot save his complaint. There has been serious concern that, by sidestepping the safeguards which restrain the reach of traditional public defamation litigation, a false light approach could compromise the constitutional guarantee of freedom of the press (see Prosser, Torts [4th ed], p 813; Restatement, Torts 2d, §652E, Comment *d*, particularly p 399; Wade, Defamation and the Right of Privacy, 15 Vand L Rev 1093, 1121). Responsively, the Restatement, which in 1933 suggested that to impose liability under the false light rubric a publication need but be "offensive to persons of ordinary sensibilities" (Restatement, Torts, §867, Comment *d*), by 1976 had raised the threshold to a "highly" offensive level (Restatement, Torts 2d, §652E, Comment *c*). Suffice it here

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3. (1 Street, Foundations of Legal Liability, p 319; Prosser, Privacy, 48 Cal L Rev 383, 398, 400; Wigmore, Right Against False Attribution of Belief or Utterance, 4 Ky LJ [No. 8] 3; Wade, Defamation and The Right of Privacy, 15 Vand L Rev 1093, 1094, 1120; McKenna, False Light: Invasion of Privacy, 15 Tulsa LJ 113, 114.)

that, even assuming, but not now deciding, that such an action is cognizable in this State, by no means does this case measure up to this kind of criterion.

[1,2] However, while plaintiff's complaint therefore was properly dismissed as a matter of law insofar as it purported to proceed against the Times, at this stage it cannot be said that plaintiff has no claim under these statutes against defendants Gorgoni, Pledge or Contact.

In this connection, it must be remembered that the motion to dismiss, one made under CPLR 3211 (subd [a], par 7), was never converted by notice to one for summary judgment as permitted by CPLR 3211 (subd [c]). In this procedural posture, the allegations of a complaint, supplemented by a plaintiff's additional submissions, if any, must be given their most favorable intendment (see *Rovello v Orofino Realty Co.*, 40 NY2d 633). The complaint here, aside from reciting facts as to the publication of the photograph and plaintiff's ensuing damages, in substance alleges that Gorgoni took the picture; that Contact, in the business of buying and selling reproduction rights of photographs, had then been commissioned by Gorgoni to sell his pictures; that Pledge was the Contact officer and employee through whom Contact, acting for Gorgoni, sold the Times the picture, the proceeds being divided between Contact and Gorgoni.

[2] True, the affidavits and exhibits these defendants submitted in support of the motion denied important aspects of the roles plaintiff ascribed to Contact and Pledge, but this did no more than create issues of fact. After all, unlike the position of the Times, none of the other three defendants played the part of publisher of the article which plaintiff's photograph accompanied. Were the plaintiff to establish the truth of his allegations, the acts in which one or more of these defendants will have been proved to have engaged will, plainly and simply, have included that of a nonconsensual selling of the photograph. Thus, operating independently from the publisher, each at that point would have "commercialized the photograph" in "furtherance of [his] trade" (*Holmes v Underwood & Underwood*, 225 App Div 360, 362). That the

sale was to a publisher of news and articles on matters of public interest would not, in and by itself, have clothed these defendants with the publisher's immunity from the reach of sections 50 and 51. Consequently, the motion to dismiss the complaint to the extent that it pleads a violation of sections 50 and 51 on the part of each of these three defendants should have been denied.

[3] The statutory claims behind us, and the unavailability of those sounding in common-law privacy apparent, we now turn to the plaintiff's attempt to advance still another cause of action, posited this time on alleged abridgment of a constitutional right to privacy. To that end, no more need here be said than that, since no State action is involved, plaintiff's constitutional claim must fail.

Accordingly, the order of the Appellate Division should be modified, with costs to plaintiff against defendants Contact Press Images, Inc., Robert Pledge and Gianfranco Gorgoni, in accordance with this opinion, and, as so modified, it should be affirmed, with costs to defendant The New York Times Company against plaintiff.

JASEN, GABRIELLI and JONES, JJ. (concurring). We concur in result in this case but cannot accept what appears to us to be the overbreadth of Judge FUCHSBERG'S opinion, addressing as it does plaintiff's false light formulation which is not necessary for the resolution of this appeal.

Chief Judge COOKE and Judge MEYER concur with Judge FUCHSBERG; Judges JASEN, GABRIELLI and JONES concur in result in a concurring memorandum; Judge WACHTLER taking no part.

Order modified, with costs to plaintiff against defendants Contact Press Images, Inc., Pledge and Gorgoni, in accordance with the opinion herein and, as so modified, affirmed, with costs to defendant The New York Times Company against plaintiff.

APPENDIX B

Court of Appeals of New York Orders
Denying Reargument Motions

1	Mo. No. 540	Motion by defendants Contact
Clarence W. Arrington, Appellant, vs. The New York Times Company, et al., Respondents.		Press Images, Inc., Gorgoni and Pledge for reargument denied. Motions by Time Inc., et al., Associated Press, and American Society of Picture Professionals, Inc., et al., for leave to file briefs amici curiae on motion for reargument, denied. Judge Wachtler took no part.
DECISION COURT OF APPEALS July 2, 1982		

	Mo. No. 578	Application by plaintiff for extension of the time within which to move for reargument denied.
Clarence W. Arrington, Appellant, vs. The New York Times Company, et al.,		Motion by plaintiff for reargument dismissed as

Respondents.

untimely, with twenty dollars costs and necessary

DECISION COURT OF APPEALS

reproduction disbursements

July 2, 1982 to defendant The New York Times Company.

Judge Wachtler took no part.

APPENDIX C

Supreme Court of New York,
Appellate Division, First
Department Opinion and Order

CLARENCE W. ARRINGTON, Respondent-Appellant, v NEW YORK TIMES COMPANY, Appellant-Respondent, and CONTACT PRESS IMAGES, INC., et al., Defendants-Respondents. — Order, Supreme Court, New York County, entered April 7, 1980, which granted the motion of the defendants Contact Press Images, Inc., Gianfranco Gorgoni, and Robert Pledge to dismiss the complaint against them and granted the motion of the defendant *New York Times* to dismiss the complaint against it but granted leave to the plaintiff to serve an amended complaint against the *New York Times* for violation of the right to privacy not based on an alleged violation of sections 50 and 51 of the Civil Rights Law, modified, upon the law, to the extent of striking the leave to the plaintiff to serve an amended complaint, and otherwise affirmed, without costs or disbursements. An article on the black middle class was published in the Sunday magazine section of the *New York Times*. A photograph of the plaintiff, not named, appeared on the cover of the section with a caption calling attention to the article inside. Claiming that he had never consented to the taking of the photograph, that the article was neither about him nor was he so much as mentioned in it, and that he strongly disagreed with its thesis, the plaintiff brought action for invasion of his right to privacy against the newspaper, the freelance photographer, the photographic agency and its president. His action claimed a constitutional and common-law right to privacy as well as such a right under sections 50 and 51 of the Civil Rights Law. (Pursuant to the leave granted by Special Term, plaintiff has served an amended complaint asserting a constitutional and common-law right to privacy.) Special Term ruled correctly that plaintiff has no cause of action under the Civil Rights Law, but neither does he have a cause of action for violation of a common-law or constitutional right of privacy. It has been consistently held in

New York that there is no right to relief for invasion of privacy other than the statutory right granted by the Civil Rights Law (*Cohen v Hallmark Cards*, 45 NY2d 493; *Wojtowicz v Delacorte Press*, 43 NY2d 858). It may well be, as plaintiff maintains, that the Court of Appeals, when next confronted with the issue, will recognize a common-law right to privacy. Meanwhile, constraining precedent compels the holding by this court that no such right presently exists. No constitutional right to privacy authorizes this action. Where a constitutional right to privacy exists, it is to protect against governmental action or intrusion into purely familial matters (see *Roe v Wade*, 410 US 113; *Whalen v Roe*, 429 US 589; *Griswold v Connecticut*, 381 US 479). Efforts to expand this right beyond this scope have been rejected (see *Paul v Davis*, 424 US 693). Concur—Sullivan, Lupiano, Lynch and Carro, JJ.

Kupferman, J. P., dissents in a memorandum as follows: I would affirm the granting of leave to the plaintiff to serve an amended complaint against the *New York Times*. I would do this on a ground different from that stated by the court at Special Term. The plaintiff spells out a cause of action for violation of his right of privacy considered in Prosser's Law of Torts ([4th ed], pp 812–813) as "False Light in the Public Eye": ("Another form in which it frequently appears is the use of the plaintiff's picture to illustrate a book or an article with which he has no reasonable connection, with the implication that such a connection exists—as where, for example, the face of an honest taxi driver is used to ornament a story about the cheating propensities of taxi drivers in the city. Still another is the inclusion of the plaintiff's name, photograph or fingerprints in a public 'rogue's gallery' of convicted criminals, when he has not in fact been convicted of any crime. The false light need not necessarily be a defamatory one, although it very often is, so that a defamation action will also lie.") The article printed in the Sunday magazine section of the *New York Times* of December 3, 1978, entitled "The Black Middle Class—Making It", was considered by some to be controversial, and the plaintiff found it offensive. However, the cover of the magazine used his photograph to illustrate the article, even though he had no connection

whatever with the article, and, in fact, had no knowledge that his photograph would be used. Under the circumstances, he should be allowed to plead that cause of action. (See *Leverton v Curtis Pub. Co.*, 192 F2d 974, 978.)

APPENDIX D

Supreme Court of New York,
New York County (Special Term) Opinion

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I

CLARENCE W. ARRINGTON,

Plaintiff,

-against-

Index No.
12009/79

THE NEW YORK TIMES CO.
CONTACT PRESS IMAGES, INC.
GIANFRANCO GORGONI AND
ROBERT PLEDGE,

Defendants.

OKIN, J.:

Plaintiff instituted this action claiming injury and damages as a result of the publication of full-length color picture of plaintiff on the front outside cover of the New York Times Magazine Section on Sunday, December 3, 1978. The picture was published with a caption reading "The Black Middle Class: Making it," which referred to an article bearing that title written by one William Brashler which was published in that issue of the New York Times Magazine Section.

Plaintiff had never consented that his picture be taken or published. Indeed, plaintiff did not even know that his picture was being taken and claims that his first knowledge of the fact that the picture was taken and was being published was in the

early morning of Sunday, December 3, 1978, when he was called and was informed by one of his business associates.

Plaintiff was born on December 31, 1951, a native of Montgomery, Alabama. He did undergraduate work at Morgan State University. He attended Columbia Graduate School of Business and obtained a Masters of Business Administration in May of 1977. Plaintiff then became associated with General Motors as a Financial Analyst and was employed in that capacity in December 1978 when the picture was published.

Plaintiff's picture had never appeared in any news media and plaintiff had never been subject of any public discussion or notority [sic] and could not be considered a public figure.

Plaintiff's name is not mentioned in the article and there is no reference to plaintiff in the article that the picture could be connected with other than, as claimed by defendants, that plaintiff's photograph was an example of the upward mobility of the Black Middle Class.

The central character of the article is a Black prostitute, now turned receptionist. The theme of the article is that there is a growing Black Middle Professional Class who are increasingly flourishing and giving evidence of being less and less concerned about the plight of their more unfortunate Black brothers.

The article, which plaintiff's picture on the front of that edition of the New York Times Magazine Section was supposed to illustrate, refers to materialistic and status-conscious, aspiring Middle Class Blacks and emphasizes the concern of members of this class with three-piece Pierre Cardin suits and the acquisition of expensive foreign cars, such as the Mercedes-Benz.

Plaintiff, in his complaint, charges violation and infringement by defendants of plaintiff's rights under Sections 50 and 51 of the N.Y. Civil Rights Law and also impingement

by defendants upon plaintiff's common law right of privacy and plaintiff's constitutional right of privacy.

The defendant, the New York Times Company (Times) and the other defendants moved to dismiss the complaint upon the ground that plaintiff has no justiciable complaint which can be based upon the defendant's use and publication of plaintiff's photograph, relying principally upon the decisions in Murray v. NY Magazine, 27 NY2d 406; Dallesandro v. Holt & Co., 4 AD2d 470; app. dismissed, 7 NY2d 735; Pagan v. NY Herald Tribune, Inc., 32 AD2d 341, 343.

The complaint alleges that defendants used and published plaintiff's picture for purposes of trade and to promote the sale of the Times Magazine and alleges that the publication of plaintiff's picture, in the manner used, was intended and did convey the impression that plaintiff was a model who had posed for the taking of the picture or photograph.

Plaintiff further alleges that the publication of plaintiff's picture on the outside cover of the Times Magazine Section subjected plaintiff to undesirable comment from friends and acquaintances and has been a source of embarrassment to plaintiff among his business associates.

Plaintiff claims that the publication of his photograph conveyed the impression that plaintiff was in accord with the views and the themes expressed in the Brashler article, which plaintiff asserts he disagrees with and finds to be degrading and disparaging to Black persons who have achieved Middle Class status. Plaintiff alleges that he has been offended and humiliated and that he has been exposed to public ridicule and contempt and caused to suffer great mental distress.

Defendants argue that in the absence of a claim of libel — and there could be none here for plaintiff's name is never used in the article nor is there any reference to plaintiff in the article — the mere fact that plaintiff might find the article in question with which his photograph was used offensive and humiliating does not give plaintiff the right [to] seek redress in

the courts; that the decisions on this subject in New York require a dismissal of this complaint.

Sections 50 and 51 of the Civil Rights Law were enacted to prevent the commercial exploitation of a person's name or photograph without his written consent. Warren & Brandeis, The Right to Privacy (1890) 4 Harv. L. Rev. 193.

Where improper use of a name or picture is at issue, the courts have consistently concluded that defendants cannot be charged with actionable commercial exploitation where the picture is published in connection with an article of general interest. Lahiri v. Daily Mirror, 162 M. 776, 295 S 382.

"A picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising within the prohibition of the statute ... unless it has no real relationship to the article ... or unless the article is a advertisement in disguise." Dellasandro v. Henry Hold & Co. 4 A.D. (2) 470, where the picture of plaintiff, a longshoreman, was published without his consent on the jacket of the biography of the "Waterfront Priest."

In Murray v. New York Magazine Co., 27 N.Y. (2) 406, plaintiff's picture, in St. Patrick's Day regalia, was presented on the outside cover of the New York Magazine.

In both cases, the court held that the placing of the picture on the outside cover of the publication — as the Times did with Mr. Arrington's picture — does not establish that the picture was used for trade or advertising purposes, and the fact that the sales of the publication may have been incidentally affected did not support plaintiff's legal rights under Sections 50 and 51 of the Civil Rights Law.

Here, however, at least as far as the defendant Times is concerned, plaintiff goes further. The complaint alleges that plaintiff, a recent MBA graduate working as a Financial Analyst for General Motors, was humiliated, distressed and emotionally upset by the sudden and unauthorized publication

of his picture on the outside cover of the New York Times Magazine Section.

Generally, where a person attends a public event, he cannot complain where his picture is incidentally published — even without his consent — in an article dealing with or relating to that event. LaFarge v. Fairchild Publication, Inc. (1965) 23 A.D.(2) 636. However, even in such a situation, while his picture may be taken and used as part of the general audience, his picture cannot be picked out and unduly featured. Gautier v. Pro-Football, Inc. (1952) 304 NY 354.

Persons who achieve success or special attention in their field can also expect public discussion, and the use of their picture under such circumstances is not actionable. Klein v. McGraw Hill, Inc., (1966) 263 F. Supp. 919 (plaintiff, a high school student achieved special recognition in the field of radio communication); Oma v. Hillman Periodicals, Inc. (1953) 281 A.D. 240 (plaintiff was a well known boxer); Delinger v. American News (1958) 6 A.P. (2) 1027, 178 S. (2) 221 (plaintiff was a well known physical training instructor and his picture was used to illustrate an article on that subject..

These cases are in line with the doctrine established in Sidis v. F-R Pub. Corp. (1938) 34 F. Supp. 19, 24; aff'd 113 F(2) 806 (2nd Cir. 1940), where the court rejected the claims asserted on behalf of a once boy genius who had conscionably changed his life style. The court recognized that under the mores of our days the public is entitled to unfettered discussion in the attempt to answer the question: "Where are they now?".

All of this flows from the recognition that Sections 50 and 51 of the Civil Rights Law must not be construed "to curtail the right of free speech or free press." Rand v. Hearst Corp., 31 AD(2) 406, 409. This statute was not intended to limit the dissemination of news or proscribe information concerning matters of public interest. Paulsen v. Personality Poster (1968) 59 M(2) 444, 299 S(2) 501.

The conflict arises in attempting to balance the public interest in the free dissemination of information against one's private interest in the preservation of his inviolate personality. Thompson v. Close Up, Inc. (1950) 278 A.D. 431.

The right to be let alone is a right that has been recognized as one of the most highly valued privileges of a civilized man. Olmstead v. U.S. 277 U.S. 438.

This right of a person to be able to make decisions relating to his person and his life style and place in society has been the basis for the recognition of Constitutional safeguards affecting many matters. Numerous recent decisions have given judicial recognition and enforcement to the concept of personal rights and private rights as guaranteed by the Constitution in matters relating to marriage, procreation, child rearing, contraception, family relationships, social relationships and education.

The opening of a person's mail by agents of the C.I.A. was condemned for the violation of the recipient's personal and private rights. Birnbaum v. U.S. (1978) 588 F(2) [sic] 319.

Jacqueline Onassis' private and personal rights were the basis for enjoining harrassment by a photographer. Galella v. Onassis, (1973) 487 F(2) [sic] 986, 353 F. Supp. 196.

Personal and private rights were sustained enjoining electronic wiretapping. Spock v. U.S. (1978) 464 F. Supp. 510.

The private rights of the plaintiffs warranted curbing surveillance and intrusion by government agents. Socialist Workers Party v. Atty Gen (1978) 463 F. Supp. 515.

While freedom of the press must be zealously protected and any attempt to censor or restrict the press must be guarded against, it is essential that in the process the private rights of citizens be protected particularly where a specific situation does not involve the need of fair comment, or freedom of expression.

Here, to sustain the right of the Times to publish plaintiff's picture without his consent and to deny him the right to claim that this act on the part of the Times humiliated and distressed plaintiff, to plaintiff's damage, would be a gross misuse of the concept of freedom of the press. Such a result would go far beyond the need for fair comment or dissemination and reasonable discussion of matters of public interest.

The right of privacy has been recognized as an independent Constitutional right. In Roe v. Wale [sic] (1973) 410 U.S. 113, this personal right, to make decisions regarding one's own person, was the basis of sustaining the right of a woman to attack abortion laws which restricted her right freely to terminate her pregnancy.

This same Constitutional right of privacy was invoked in a case dealing with drug restricting statutes. Whalen v. Roe, (1977) 429 U.S. 589, 598.

And, recently, here in New York, the Appellate Division, 4th Department referred to and recognized this independent Constitutional right of privacy as the basis for declaring that the right to freedom of action in the privacy of one's own home, even where admittedly there was deviate sexual behavior between consenting adults, required the upsetting, on Constitutional grounds, of a statute proscribing consensual sodomy. People v. Onofre, App. Div., 4th Dep., NYLJ 2/5/80 p. 4.

On the basis of Murray v. New York Magazine Co., 27 N.Y. (2) 406 and Dellasandro v. Henry Hold & Co., 4 A.D. (2) 470 and similar cases, plaintiff cannot sustain a recovery for alleged commercial exploitation of his picture. To the degree that plaintiff seeks to recover damages for a claim of violation by defendants of plaintiff's rights under Section 50 and 51 of the Civil Rights Act, plaintiff cannot succeed in New York.

However, there have been enough adjudications to warrant sustaining plaintiff's right to recover damages for the

violation of his right to be let alone, sometimes referred to as plaintiff's Constitutional right of privacy.

Plaintiff had as much right to decide that he did not want publicity and that he did not want his picture plastered on the front of the New York Times Magazine Section as did the individuals whose personal rights were involved in the various cases cited, where a Constitutional right of privacy was recognized.

Plaintiff should have the right to plead a cause of action limited to a breach of this Constitutional right of privacy, which — as plaintiff claims — resulted in his distress and humiliation and to establish such damages as plaintiff can prove.

The activities of the defendants other than the Times related wholly to the taking of the picture. The Times was responsible for the publication of the picture and the decision to place the picture on the front of the New York Times Magazine Section.

Accordingly, the motion by defendants to dismiss the complaint is granted and plaintiff is given leave to serve an amended complaint, which shall not be based upon the alleged violation of Sections 50 and 51 of the Civil Right Law, only against the New York Time [sic].

The complaint against the other defendants is dismissed without leave to replead.

Dated: March 6, 1980 /s/ Louis J. Okin

J.S.C.

APPENDIX E

Order of Justice Marshall Extending Time to File Petition for Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-285

CLARENCE W. ARRINGTON,
Petitioner,
v.
THE NEW YORK TIMES COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 15, 1982

/s/ Thurgood Marshall

Associate Justice of the
Supreme Court of the
United States

Dated this 21st
day of September , 1982

APPENDIX F

Constitutional Provisions Involved

The first amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Constitution of the United States of America 911 (L.S. Jayson, Supervising ed. 1973).

The third amendment provides:

> No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Id. at 1037.

The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seàrches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id. at 1041.

The fifth amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

> or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. at 1089.

The ninth amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Id. 1257.

The fourteenth amendment provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Id. at 1303.

APPENDIX G

State Statutory Provisions Involved

Sections 50 and 51 of the New York Civil Rights Law

§ 50. Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. Action for injunction and for damages

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with

his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.